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No.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

WILLIAM E. JONES and GLADYS A. JONES, husband and wife, and ACME MEAT COMPANY, INC., an Arizona corporation,

PETITIONERS,

v.

PRESCOTT A. BERRY, District Director, Internal Revenue Service; DAVID C. ARNELL, Chief, Criminal Investigation Division, Internal Revenue Service; BERNICE YOST, Group Manager, Criminal Investigation Division, Internal Revenue Service; JOHN M. MANNING, Special Agent, Criminal Investigation Division, Internal Revenue Service; JAMES E. MASON, Special Agent, Criminal Investigation Division, Internal Revenue Service; JOHN DOE I-X, inclusive; and JANE DOE I-X, inclusive,

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether a warrantless, surreptitious investigation of William and Gladys Jones and Acme Meat Company by undercover Internal Revenue Service agents posing as prospective purchasers of the business, which elicited disclosure of incriminating business records, constituted an unreasonable search violative of the fourth amendment.

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RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

William E. and Gladys A. Jones, and Acme Meat Company, Inc., petition for a

writ of certiorari to review the opinion of the United States Court of Appeals for the Ninth Circuit in this action.

OPINIONS BELOW

The opinion of the court of appeals (App. B, infra, B-1 - B-24) is reported unofficially at 83-2 U.S. Tax Cas. (CCH) ¶ 9563. The opinion of the district court (App. A, infra, A-1 - A-40) is reported at 524 F. Supp. 645.

JURISDICTION

The opinion of the court of appeals was filed on October 24, 1983. A timely petition for rehearing was denied on December 20, 1983. (App. C, infra, C-1 - C-2) No extension of time within which to file a petition for certiorari has been requested. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The fourth amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

1. In May of 1977, I.R.S. Special Agent John Manning requested approval for an undercover operation known as the Business Opportunities Project (BOP), designed to discover tax fraud by penetrating businesses offered for sale. (App. B at B-2 - B-3.) By posing as prospective purchasers, I.R.S. special agents would gain the confidence of business sellers and attempt to elicit documentary evidence of "skimming" (diverting

income from ordinary bookkeeping channels and not reporting the income for tax purposes) for use in subsequent criminal prosecutions. (App. B at B-3, n. 1.) The project was approved by the Arizona District I.R.S. Director in June of 1977. After initial disapproval, the project received qualified approval by the National Director in January of 1981. Prior to undercover contact with sellers, the National Director required that two express conditions be satisfied: first, that there be "[A] reasonable basis to believe that the taxpayer offering the business for sale has understated the reported net profit of the business. . ." and next, that "[T]he [tax] returns of the business do not reflect a realistic picture when compared with the asking (selling) price." (App. B at B-3, n. 2.)

2. Special Agent Manning initiated the BOP investigation at issue in January of 1981 by responding to a classified newpaper advertisement. On January 10, 1981, he visited the listing business broker and stated that he and an undisclosed partner intended to purchase a business in the Phoenix area. (App. B at B-3.) Without openly discussing skimming, Manning communicated by hand gestures and veiled suggestions that he was particularly interested in businesses with a cash flow susceptible to skimming. (App. B at B-4.) The broker responded that he knew of an unnamed business that might suit Manning's purposes, but never discussed whether skimming was actually occurring. (App. B at B-4.)

3. On February 7, 1981, Manning again met with the broker at his business office and sought further information.

(App. B at B-4.) The broker then identified the business as Acme Meat Company, a Phoenix wholesale meatpacking operation. After Manning executed a confidentiality agreement, providing that Manning would not disclose information except to seek professional advice, the broker allowed Manning to examine Acme Meat Company's corporate income tax returns for the fiscal years 1976, 1977, and 1978. (App. B at B-4.) Manning and the broker then toured the premises of Acme Meat Company and met with its owner, William E. Jones. (App. B at B-4 - B-5.) Manning's discussion with Jones regarding skimming did not go beyond hints and suggestions, but Manning gained the impression that Jones was skimming through "[A]n informal meeting of the minds." (App. B at B-5; App. A at A-5.) Manning reaffirmed his ostensible interest in purchasing the business and

requested the opportunity to review its books and records. (App. B at B-5.)

4. On February 18, 1981, Manning spoke with the broker on the telephone to arrange their next meeting. During conversation, the broker asked Manning, "Are you sure you are not from the I.R.S.?" Manning laughed and said nothing. (App. A at A-5.)

5. On April 4, 1981, Manning met with William Jones and Gladys A. Jones, his wife, at the Joneses' personal residence. Manning examined at length the cash receipts and disbursements ledger, the general corporate ledger, invoices and various other business records. (App. B at B-5.) Though he found no documentable proof of unreported income, as required by the BOP guideleines, he persisted and requested another meeting to introduce the business to his supposed partner. (App. B at B-5.)

6. On April 25, 1981, Manning and his partner, Special Agent James E. Mason, met William Jones at the Acme Meat Company factory. (App. B at B-6.) Manning and Mason had previously decided to adopt a "good guy-bad guy" strategy, where Manning would feign interest in purchasing while Mason would express reluctance and take a "show me" attitude. (App. A at A-6.) After touring the plant, Mason stated that he would not purchase the business unless Jones could provide records demonstrating skimmed income. (App. B at B-6.) Jones thus led the agents to his home, where his wife produced substantiating records. (App. B at B-6.) The agents then left, promising to inform the Joneses promptly of their decision. (App. B at B-6.)

8. The agents promptly decided that they now had probable cause to justify issuance of a search warrant.

On May 1, 1981, a search warrant based on evidence discovered during the April 25 meeting was issued by a United States Magistrate. (App. A at A-9.) The house was searched that day, as well as a second residence owned by the Joneses pursuant to consent given by Mrs. Jones during the course of the search. (App. B at B-7.) Though the search warrant described five specific items of evidence, sixteen boxes containing over three thousand items of records, papers, and miscellaneous supplies were seized. (App. A at A-28, n. 3; App. B at B-7.)

9. After making two requests for return of all seized items, the Joneses and Acme Meat Company filed a petition on May 27, 1981, seeking suppression and return of their records. (App. B at B-7.) The district court exercised jurisdiction under rule 41(e), Federal Rules of Criminal Procedure, and the

inherent equitable jurisdiction of the court. (App. A at A-13 - A-14.) Finding after evidentiary hearing that the search warrant was based on information obtained as a result of an unreasonable undercover search in violation of the fourth amendment, the district court suppressed all evidence seized. (App. A at A-26.) On appeal, the Ninth Circuit reversed and remanded.[1]

REASONS FOR GRANTING THE PETITION

This case presents significant questions regarding the expanding use of surreptitious searches for evidence of criminal tax evasion by undercover special agents of the Internal Revenue

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[1] The court of appeals (App. B at B-7, n. 3) agreed with the district court (App. A at A-30 - A-31) that items seized in excess of those described in the search warrant must be returned to the Joneses and remanded for further findings on this issue.

Service. Furthermore, the rationale employed by the court of appeals broadly insulates such covert operations from constitutional scrutiny under the misplaced confidence doctrine announced in Hoffa v. United States, 385 U.S. 293 (1966). Absent intervention by this Court, deceit will guarantee a safe harbor against fourth amendment scrutiny to the entire range of federal, state and local law enforcement agencies. The court of appeals itself (App. B at B-16) appreciated the horrendous implications of this Orwellian scenario:

> Democratic governments are based on a relationship of trust between government and the governed. If the possibility exists that the next acquaintance one makes may be a governmental agent conducting a hidden investigation unjustified by any indication of wrongdoing, every relationship will be tainted by suspicion and fear.

Petitioners submit that certiorari jurisdiction is appropriate under

guidelines set forth in rule 17(a) and (c), Rules of the United States Supreme Court, on the following grounds: (1) the decision of the Ninth Circuit at issue is in direct conflict with the Fifth Circuit's holding in United States v. Tweel, 550 F.2d 297 (5th Cir. 1977); (2) the Ninth Circuit's decision misapplies the fourth amendment analysis announced by this Court in Katz v. United States, 389 U.S. 347 (1967).

1(a). In United States v. Tweel, 550 F.2d 297 (5th Cir. 1977), the defendant appealed from conviction on counts including income tax evasion for the trial court's refusal to supress evidence secured by a deceptive I.R.S. investigation, on the following facts.

A revenue agent from the I.R.S. civil audit division contacted the defendant's accountant, requesting access to records for an audit of

Tweel's income tax returns. Due to a special agent's participation in a previous audit of Tweel, the accountant inquired whether a special agent was involved in this investigation. The revenue agent responded that no special agent was involved, leading the accountant to believe that only a civil audit was intended. The revenue agent did not disclose that he was participating in a criminal investigation at the specific request of the Organized Crime and Racketeering Section of the Department of Justice. The accountant then voluntarily surrendered his client's records to aid in the audit, which were used as evidence in securing conviction.

Relying on a line of precedent[2] holding that consent searches are unreasonable under the fourth amendment if consent is induced by deceit, trickery or misrepresentation by Internal Revenue agents, the Fifth Circuit held that the consent to review the taxpayer's records was obtained in violation of the fourth amendment since it was secured by the deception of an I.R.S. agent:

> From the facts we find that the agent's failure to apprise the appellant of the obvious criminal nature of this investigation was a sneaky deliberate

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[2] United States v. Rothstein, 530 F.2d 1275 (5th Cir. 1976); United States v. Dawson, 486 F.2d 1326 (5th Cir. 1973); United States v. Bland, 458 F.2d 1 (5th Cir. 1972), cert. denied, 409 U.S. 843 (1972); United States v. Ponder, 444 F.2d 816 (5th Cir. 1971), cert. denied, 405 U.S. 918 (1972); United States v. Tonahill, 430 F.2d 1042 (5th Cir. 1970), cert. denied, 400 U.S. 943 (1970); United States v. Prudden, 424 F.2d 1021 (5th Cir. 1970), cert. denied, 400 U.S. 831 (1970).

> deception by the agent under the above standard and a flagrant disregard for appellant's rights. The silent misrepresentation was both intentionally misleading and material.
>
> . . . .
>
> We cannot condone this shocking conduct by the IRS. Our revenue system is based upon the good faith of the taxpayers and the taxpayers should be able to expect the same from the government in its enforcement and collection activities.

United States v. Tweel, 550 F.2d at 299-300 (citations and footnotes omitted).

(b). In the instant case, the district court followed United States v. Tweel, 550 F.2d 297, in entering its order that all items seized from the Joneses be returned and supressed as evidence. The district court first found that the actions of Special Agents Manning and Mason in meeting with the Joneses were intended solely to discover

evidence of criminal conduct by the Joneses. (App. A at A-18.) The April 4 and April 25, 1981, meetings were thus held to be searches within the meaning of the fourth amendment:

> As the Court observed in Haerr v. United States, 240 F.2d 533, 535 (5th Cir. 1957): "A search implies an examination of one's premises or person with a view to the discovery of contraband or evidence of guilt to be used in prosecution of a criminal action. The term implies exploratory investigation or quest."

(App. A at A-21.)

The district court next held that the reasonableness of warrantless searches during undercover operations turns on the particular circumstances of each case, citing Lewis v. United States, 385 U.S. 206, 208 (1966). Resting squarely on the holding in United States v. Tweel, 550 F.2d 297, the district court found that Special Agents Manning and Mason induced the

Joneses to consent to a surreptitious search of their records by the use of deceit and misrepresentation in violation of the fourth amendment:

> This Court believes that the conclusion in Tweel is equally appropriate in this case . . . . Indeed, the facts of this case present an even more egregious intrusion on the rights of petitioners since they did not know Manning and Mason were associated with the IRS, whereas the appellant in Tweel was at least aware that he was dealing with agents he thought were engaging in routine civil audit.

(App. A at A-20.)

The district court thus concluded that the search warrant at issue was based on evidence obtained as a result of an illegal search, requiring suppression as fruit of the poisionous tree under Alderman v. United States, 394 U.S. 165, 177 (1969). (App. A at A-25.)

(c). In reversing the district court, the Ninth Circuit attempted to

distinguish the case at bar from United States v. Tweel, 550 F.2d 297, and its predecessors, by contrasting misrepresentation by known I.R.S. agents at issue in Tweel against misrepresentation by agents who entirely conceal that they act on behalf of the government:

> The district court relied principally on the Fifth Circuit's decision in United States v. Tweel, 550 F.2d 297 (1977), to conclude that a violation of the fourth amendment occurred in this case. Tweel, however, is distinguishable. There, IRS agents, known to the suspect to be IRS agents empowered to conduct civil audits, abused the voluntary civil tax reporting and investigation system by inducing the suspect to turn over records for a criminal investigation. Thus, they abused the powers of their positions. Here, by contrast, the IRS agents did not pretend to be civil agents, thereby implicitly invoking their powers as civil investigators, when in fact they intended to conduct a criminal investigation. Rather, the agents pretended to be fellow criminals in order to gain the Joneses'

> confidence. Such deception is far different from that practiced in Tweel.

(App. A at B-12, n. 5.)

Petitioners submit that the distinction is legally immaterial. The policy considerations of good faith and voluntary compliance that based the decision in Tweel apply equally to the facts in the case at bar, as the district court (App. A at A-19 - A-20) recognized in its opinion, and nothing in Tweel suggests that the Fifth Circuit would limit its holding to instances of deception by I.R.S. agents who identify themselves as such. The government's freedom to deceive the citizenry in law enforcement activities, and indeed the scope of protections guaranteed under the fourth amendment, would otherwise hinge on the cosmetic consideration of whether the perfidious governmental agent opted to conceal or disclose his badge.

(d). In summary, the Ninth Circuit's decision in the instant case cannot be harmonized with the Fifth Circuit's line of precedent concluding with United States v. Tweel, 550 F.2d 297. Resolution of this conflict is essential. Petitioners are presently aware of a related case challenging the Business Opportunity Program pending before the Eleventh Circuit,[3] and intensified undercover operations by the I.R.S. will likely lead to such litigation in other circuits in the near future. Under rule 17(a), Rules of the United States Supreme Court, petitioners urge the Court to provide guidance by exercising certiorari jurisdiction.

2(a). The Ninth Circuit entered its decision with self-confessed reluctance.

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[3] United States v. Centennial Builders, Inc., No. 83-7524 (11th Cir. brief for appellants filed December 1983).

Though recognizing the challenge to individual liberty posed by such undercover searches without probable cause (App. B at B-15 - B-16), the court considered itself constrained to reverse the district court under the decision in Katz v. United States, 389 U.S. 347 (1967):

> While we agree with the district court that the BOP, even if implemented in conformity with the National Director's requirements, may ultimately be destructive, we reluctantly disagree that such policy concerns can control our decision here. . . .
>
> . . . .
>
> When the Katz standard is applied to the facts presented by this case, we conclude that the IRS activities with respect to the Joneses and Acme Meats, however unwise and shortsighted they may have been, did not constitute a search within the meaning of the fourth amendment.

(App. B at B-11 - B-12.)

Petitioners submit that the policy concerns discounted by the court of

appeals are crucial to analysis of fourth amendment issues and that the Ninth Circuit's application of the standard announced in Katz v. United States, 389 U.S. 347, conflicts with the Court's decision.

(b). The Ninth Circuit's rationale in holding that the I.R.S. activities did not constitute a fourth amendment search may be summarized as follows: (1) under Katz v. United States, 389 U.S. 347 (1967), privacy interests are protected by the fourth amendment where a two-pronged test is met (App. B at B-10); (2) the misplaced confidence doctrine announced in Hoffa v. United States, 385 U.S. 293 (1966), establishes a per se rule that a person has no expectation of privacy in information voluntarily revealed to an undercover agent (App. B at B-14 - B-15); (3) the Joneses fail the first prong of the Katz test

since they disclosed information to undercover agents, who learned nothing that the Joneses did not voluntarily reveal (App. B at B-14, n. 6).

The decision in Hoffa v. United States, 385 U.S. 293, announced on the same day as the decision in Lewis v. United States, 385 U.S. 206 (1966), rested on so-called "trespass analysis" formerly applied in fourth amendment cases. Hoffa expressly relied on the rationale that the fourth amendment protects "the security a man relies on when he places himself or his property within a constitutionally protected area. . . ." 385 U.S. at 301. The Court held that incriminating statements made to a government informer were not protected by the fourth amendment because Hoffa "was not relying on the security of his hotel suite when he made the incriminating statements. . . ." Id. at 302.

Lewis similarly found that fourth amendment protections normally attendant the home as a constitutionally protected area were lost when the residence was used to transact illegal business. 385 U.S. at 211.

Trespass analysis was in theory susceptible of mechanical application; absent waiver under a confusing array of exceptions, certain defined areas were sanctuaries from governmental intrusion. As the court of appeals recognized (App. B at B-9), this Court discarded trespass analysis one year later in Katz v. United States, 389 U.S. 347. Hoffa and Lewis were not thereby overruled--their continued vitality, however, depended on the privacy interest rationale of Katz.

Hoffa and Lewis were harmonized with Katz in United States v. White, 401 U.S. 745 (1971). The Court justified their viability by application of the

two-pronged test set forth in Justice Harlan's concurring opinion: "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" Katz v. United States, 389 U.S. at 361 (Harlan, J., concurring).

The first prong of this standard inquires whether the defendant subjectively expected that disclosures of wrongdoing would be kept from the government. The Court recognized that this will rarely be answered in the negative:

> Our problem is not what the privacy expectations of particular defendants in particular situations may be or the extent to which they may in fact have relied on the discretion of their companions. Very probably, individual defendants neither know nor suspect that their colleagues have gone or will go to the police or are carrying recorders or transmitters. Otherwise, conversations

> would cease and our problem with these encounters would be nonexistent or far different from those now before us.

United States v. White, 401 U.S. at 751-52.

The second prong inquires whether society recognizes the defendant's subjective expectation of privacy as reasonable. Here the Court specifically considered Hoffa and Lewis:

> Our problem, in terms of the principles announced in Katz, is what expectations of privacy are constitutionally "justifiable" - what expectations the Fourth Amendment will protect in the absence of a warrant. So far, the law permits the frustration of actual expectations of privacy by permitting authorities to use the testimony of those associates who for one reason or another have determined to turn to the police, as well as by authorizing the use of informants in the manner exemplified by Hoffa and Lewis.

United States v. White, 401 U.S. at 752.

This altered the application of the misplaced confidence doctrine. Under

trespass theory as applied in Hoffa, the fourth amendment was per se inapplicable where a government agent was invited onto premises which otherwise qualified as a protected area. Under the Katz rule, if the defendant's conduct evidences an expectation that disclosures will not be revealed to the government, the reasonableness of this expectation must be evaluated on an ad hoc basis. Hoffa and Lewis are relevant to this inquiry as guiding principles, but do not control the outcome mechanically.

(c). The Ninth Circuit considered the misplaced confidence doctrine under the first prong of the Katz test:

> The first part of the Katz test asks whether the Joneses exhibited by their conduct an intention to preserve as private the evidence of skimming obtained by the IRS agents. See Smith v. Maryland, 442 U.S. 735, 740 (1979). Pertinent to answering this question are the decisions of the Supreme Court in Hoffa

v. United States, 385 U.S. 293 (1966), and Lewis v. United States, 385 U.S. 206 (1966).

(App. B at B-13 - B-14.)

The court of appeals considered that the Joneses' disclosure of wrongdoing of itself belied any subjective intent to preserve privacy under the first prong of Katz test. (App. B at B-14 - B-15.) The court thus held that Hoffa "compelled the conclusion" that fourth amendment rights were not involved (App. B at B-14) and did not reach the issue of reasonableness under the second prong of the Katz test. Under this interpretation of the misplaced confidence doctrine, judicial inquiry into the justification for or reasonableness of an undercover agent's intrusion in the first instance is foreclosed as a matter of law.[4]

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[4] Extending this argument to the extreme, covert operations by agents posing as lawyers or priests would not be subject to fourth amendment scrutiny.

(d). In common parlance, a fact is no longer private if disclosed to any person; under the fourth amendment, however, privacy enjoys a different meaning. The Court in Katz recognized that privacy in the context of fourth amendment analysis is a term of art, relating specifically to the right to be free from governmental intrusion:

> [T]he Fourth Amendment cannot be translated into a general constitutional "right to privacy." That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all . . . . But the protection of a person's general right to privacy--his right to be let alone by other people--is . . . left largely to the law of the individual States.

Katz v. United States, 389 U.S. at 350-351.

This is illustrated by the facts in Katz. The government there secured incriminating evidence of illegal

wagering by tapping conversations made on a public telephone. The suspect engaged in incriminating conversations with a third person and thus surrendered privacy in the general sense. The Court held, however, that the suspect could nonetheless expect to carry on the conversation free from governmental eavesdropping. The fourth amendment may protect an individual's right to engage in confidential dealings with others; disclosure of incriminating facts to a third person does not automatically destroy fourth amendment privacy expectations or justify government interference.

(e). The numerous progency of Hoffa cited by the court of appeals (App. B at B-13 - B-14) have been slow to recognize Katz--indeed, Katz is cited but once for an unrelated proposition. Their holdings, however, are readily harmonized.

Hoffa v. United States, 385 U.S. 293 (1966), considered a conspiracy to tamper with an empaneled jury. Lewis v. United States, 385 U.S. 206 (1966), considered a narcotics transaction. United States v. Scott, 521 F.2d 1188 (9th Cir. 1975), considered a tax rebellion conspiracy. United States v. Schuster, 684 F.2d 744 (11th Cir. 1982), rehearing granted, 697 F.2d 910 (11th Cir. 1983), considered a transaction in counterfeit currency. United States v. Davanzo, 699 F.2d 1097 (11th Cir. 1983), considered a horse drugging conspiracy. United States v. Lovasco, 431 U.S. 783 (1977), considered a conspiracy to market illegal firearms. In each of these cases, undercover government agents or informers penetrated ongoing illegal transactions. Further, the undercover penetrations were not arbitrary--in each case, some basis existed to believe that

unlawful conduct would occur. These instances fall squarely within the reach of undercover operations traditionally recognized as constitutional:

> Artifice and stratagem may be employed to catch those engaged in criminal enterprises. . . . The appropriate object of this permitted activity, frequently essential to the enforcement of the law, is to reveal the criminal design: to expose the illicit traffic, the prohibited publication, the fraudulent use of the mails, the illegal conspiracy, or other offenses, and thus to disclose the would-be violators of the law.

Sorrells v. United States, 287 U.S. 435, 441-442 (1932) (quoted in Lewis v. United States, 385 U.S. at 209, n. 5).

Furthermore, these cases are consistent with the standard announced in Katz. Presumably suspects in the Hoffa line of cases subjectively expect freedom from governmental interference under the first prong, for they likely would abandon the illegal enterprise if they expected that their partner in crime was

an informer or law enforcement agent. See United States v. White, 401 U.S. at 751-52.

None of these cases, however, meets the second prong of the Katz test. Society does not recognize as reasonable a criminal's expectation that he can engage in illegal transactions without the threat of governmental intrusion; a person who conspires to commit crime has no legitimate complaint if he chooses his co-conspirators poorly.

(f). Petitioners urge that if the Katz standard is properly applied to the facts of this case, the policy concerns which the Ninth Circuit discarded must be entertained in considering reasonableness under the second prong of the Katz test.

The Joneses set out to market their meat packing company by listing the business with a broker. In the ordinary course of such a sale, sensitive business

records must be revealed and privacy in the general sense is lost. The Joneses could nonetheless expect to offer their business without the threat of direct interference by the government.

Applying the first prong of the Katz test, the Joneses evidenced a subjective belief that they could disclose business records without government interference. No disclosures were made until the prospective purchasers had been screened by their broker; records were made available only under a written confidentiality agreement. Indeed, their broker affirmatively questioned whether Special Agent Manning was an I.R.S. agent--Manning laughed and evaded the question. (App. A at A-5.) It is clear that the Joneses never would have cooperated with their "buyers" had they subjectively expected government penetration.

Application of the second prong of

Katz distinguishes the instant case from cases beginning with Hoffa and Lewis. While society has no interest in protecting illegal transactions, it has a substantial interest in protecting commerce and allowing disclosures necessary to convey legal businesses.

This is reflected by rights provided under state law regarding the confidentiality of business records. The Joneses enjoyed trade secret rights in their business records which are entitled to legal protection. See Burden Co. v. Sylk, 389 F. Supp. 847 (E.D. Pa. 1968). Agreements to prevent disclosure of trade secrets, including business records, are valid and enforceable. See Painton & Co. v. Bourns, Inc., 442 F.2d 216 (2d Cir. 1971); Water Services, Inc. v. Tesco Chemical, Inc., 410 F.2d 163 (5th Cir. 1969). Disclosure of such information under an agreement of

confidentiality does not destroy its nature as a trade secret. Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 472 (1974). The Joneses did not open their records to the world; they made selective disclosures in a fashion which society recognizes as reasonable.

Society has little interest, on the other hand, in allowing such undercover operations under our facts. The proposed sale of Acme Meat Company was a lawful transaction; the intent of the I.R.S. agents was not to penetrate ongoing criminal conduct, but to shop for evidence of completed crime. As the court of appeals recognized, the penetration of the business began without any indication of wrongdoing on the Joneses' part. (App. B at B-15 - B-16.) That the I.R.S. can now offer after-the-fact justification for the operation begs the question of whether such governmental intrusion

should be considered reasonable by society in the first instance.

(g). In summary, petitioners submit that the Ninth Circuit misconstrued the scope of privacy interests and misapplied the analytic framework announced in Katz v. United States, 389 U.S. 347, and elaborated in United States v. White, 401 U.S. 475. The result is an untenable constriction of judicial discretion with respect to fundamental rights. Absent correction by this Court, the Ninth Circuit's interpretation of the misplaced confidence doctrine will allow wholesale evasion of the fourth amendment by any law enforcement agent who successfully employs a deceptive guise.[5] Petitioners

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[5] For instance, the Court recently held in Michigan v. Clifford, No. 82-357 (decided January 11, 1984), that a search warrant is required, absent consent or exigent circumstances, to search for criminal evidence of arson on fire-damaged

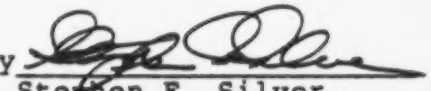
urge the Court to accept certiorari jurisdiction under rule 17(c), Rules of the United States Supreme Court.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED this 19th day of January, 1984.

BURCH & CRACCHIOLO, P.A.

By 

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premises. This requirement could be readily evaded by law enforcement agents who deceitfully secured permission to search, posing as insurance adjusters seeking to estimate damages.

CERTIFICATE OF MAILING

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

STEPHEN E. SILVER, being first duly sworn, upon his oath deposes and says:

That forty (40) copies of the foregoing Petition for Certiorari of Petitioners William E. Jones and Gladys A. Jones, husband and wife, and Acme Meat Company, Inc., an Arizona corporation, and the separately bound Appendix thereto were mailed within the time permitted on January 19, 1984, by depositing the same in a United States post office, with first-class postage prepaid, properly addressed to the Clerk of the Court.

That three (3) copies of said Petition for Certiorari and Appendix were mailed on January 19, 1984, in the same manner, to:

The Solicitor General
Department of Justice
Washington, D. C. 20530;

That three (3) copies of said Petition and Appendix were mailed on January 19, 1984, in the same manner, to:

Glenn L. Archer, Jr.
Assistant Attorney General
Michael L. Paup
Attorney, Tax Division
Department of Justice
Washington, D. C. 20530
Attorneys for Respondents

STEPHEN E. SILVER

Subscribed and sworn to before me this 19th day of January, 1984.

Notary Public

My commission expires:

May 24, 1987

No. 83-1216

Office - Supreme Court, U.S.
FILED
JAN 23 1984
ALEXANDER L. STEVAS
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

WILLIAM E. JONES and GLADYS A. JONES, husband and wife, and ACME MEAT COMPANY, INC., an Arizona corporation,

PETITIONERS,

v.

PRESCOTT A. BERRY, District Director, Internal Revenue Service; DAVID C. ARNELL, Chief, Criminal Investigation Division, Internal Revenue Service; BERNICE YOST, Group Manager, Criminal Investigation Division, Internal Revenue Service; JOHN M. MANNING, Special Agent, Criminal Investigation Division, Internal Revenue Service; JAMES E. MASON, Special Agent, Criminal Investigation Division, Internal Revenue Service; JOHN DOE I-X, inclusive; and JANE DOE I-X, inclusive,

RESPONDENTS.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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APPENDIX A

OPINION AND ORDER

OF THE DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

WILLIAM E. JONES and GLADYS A. JONES and ACME MEAT COMPANY, INC., Petitioners, v. PRESCOTT A. BERRY, et al., Respondents.	FILED October 20, 1981 W. J. Furstenau, Clerk, U.S. District Court For the District Of Arizona NO. CIV 81-581 PHX VAC OPINION AND ORDER

INTRODUCTION

Petitioners were targets of an undercover operation conducted by the Internal Revenue Service (IRS). Prior to the institution of any criminal proceeding, petitioners filed a petition seeking the return and future suppression of certain evidence seized by the IRS agents. For the reasons hereinafter stated, the Court will grant the relief requested in the petition.

FACTS

In May of 1977 respondent John M. Manning, a Special Agent with the IRS, submitted a request for approval of the Business Opportunities Project (BOP). The objective of the BOP is to discover tax fraud by the use of IRS Special Agents acting in an undercover capacity as prospective purchasers of businesses for sale. The Agents would attempt to gain the confidence of the seller in order to elicit evidence of "skimming", the understatement of income, by the seller.

The BOP was approved by the District Director and went into effect as a local District project on June 2, 1977. Respondent David C. Arnell, Phoenix District Chief of the Criminal Investigation Division, then submitted a request for national approval of the program, which was initially denied on January 21,

1978 by the National Director of the Intelligence Division (now the Criminal Investigation Division). After the project was reclassified as a "quasi, non-penetration undercover approach" rather than as a deep penetration undercover technique which requires national approval, the National Director authorized the BOP on January 23, 1981. (Exhibit 18).

On January 10, 1981 Special Agent Manning visited Business World Investments, Inc. and represented to sales representative Frank Bornstein that he and a partner were interested in purchasing a business in the Phoenix area. Manning stated that he was originally from Springfield, Massachusetts and presented the business card of "J. Manning and Assoc." (Exhibit 1). Although the term "skimming" may not have been used at this initial meeting,

Manning indicated by veiled suggestions and hand gestures that he was interested in businesses with a substantial cash flow susceptible to skimming. Without mentioning the name of the company, and without discussing whether skimming was actually occurring, Bornstein responded that he had previously listed a meat company which might suit Manning's purposes.

After lining up a single party listing for petitioner Acme Meat Company in favor of Manning, Bornstein met again with Manning on February 7, 1981 and disclosed that the meat business was named Acme Meat Company. Manning signed a confidentiality agreement promising not to divulge information about Acme Meat to others, except to secure their advice and counsel. (Exhibit 2). Manning then scanned the corporate tax returns for Acme Meat for the fiscal years 1976, 1977

and 1978 which were given to him by Bornstein.

Bornstein and Manning then went to the premises of Acme Meat where Manning toured the business and met petitioner William E. Jones. Manning raised the subject of skimming to Jones while they were temporarily outside the presence of Bornstein. Though the conversation was conducted in somewhat vague terms, Manning testified that it was his impression, as a result of an "informal meeting of the minds," that Jones was skimming.

On February 18, 1981 Bornstein contacted Manning by telephone and asked: "Are you sure you are not from the IRS?" Manning testified that he just laughed, said nothing, and proceeded to arrange for another meeting with Jones.

On the morning of April 4, 1981 Manning met with Bornstein, William Jones

and his wife, Gladys, who is also a petitioner in this case, at the Joneses' Pinchot residence. Manning reviewed various corporate books and records, including sales invoices and the cash receipts and disbursements ledger for the fiscal year 1981, certain fiscal year 1980 business records, as well as the general corporate ledger.

Manning arranged to have his supposed business partner, Special Agent James E. Mason, a respondent herein, meet the Joneses to further consider the purchase of the business. Manning and Mason decided that Manning would feign interest in buying the business, while Mason would be reluctant and take a "show me" attitude. Manning and Mason toured the premises of Acme Meat with Mr. Jones on April 25, 1981. At the insistence of Manning, Bornstein did not attend this meeting. With the admitted intent of

viewing petitioners' records the agents again stated that they were only interested in purchasing a business that could generate substantial skimming and Mr. Jones then agreed to show them the records of the skim which were located at his home.

Upon arriving at the Joneses' Pinchot residence the agents noted a sign that the home was for sale. The agents asked for and were granted a tour of the house by Mr. and Mrs. Jones on the pretext that Mason knew someone who might be interested in purchasing it. Manning testified that in fact a purpose of the tour was to allow them to prepare a diagram of the house in order to obtain a search warrant.

The agents and the Joneses then went into the kitchen where certain books and records were on display. In response to Mason's request for proof of skimming,

Mrs. Jones removed a five by six inch paper from a file cabinet in the kitchen. Mason expressed doubt as to the validity of the monthly and yearly totals on the paper and asked for documentation to substantiate the figures, selecting at random the month of February, 1977 for a sample audit. The Joneses lead the agents to their bedroom where Mrs. Jones removed the February, 1977 skimmed invoices from the top left drawer of their dresser. After returning to the kitchen, Mrs. Jones reconciled precisely the figure entered on the summary sheet by adding the invoice totals on a calculator. Mason then assisted Mrs. Jones in returning one of the corporate ledgers to another bedroom where Mason noted the location of other books and records.

Within a few days after this April 25, 1981 meeting Manning drew a diagram of the Pinchot residence and prepared a

search warrant affidavit. A raid plan for the search was prepared by Special Agent David McCluskey. On the morning of May 1, 1981 a search warrant was issued by a United States Magistrate. (Exhibit 6). The agents assigned to execute the search met at the IRS offices where a copy of the search warrant was briefly circulated among the agents. The search warrant listed five specific items to be seized, and Manning instructed the agents as to the location of each item by means of the diagram included in the raid plan.

The search began at approximately 11:40 a.m. on May 1, 1981 when Special Agents McCluskey and Laura Brown announced to Mrs. Jones that they were real estate agents interested in viewing the premises. They followed Mrs. Jones into the kitchen where the agents displayed their badges and announced that they were there to execute a search

warrant, which may have been shown to Mrs. Jones at this time. Mrs. Jones was read her constitutional rights and declined the opportunity to telephone her husband or an attorney. Mrs. Jones was asked for consent to search the storage buildings behind the house and she responded that the records had been moved from the storage buildings to the Joneses' new residence on Rowland Lane. Mrs. Jones then read and signed consent forms to allow the search of the storage buildings at the Rowland Lane residence. Agent Brown remained with Mrs. Jones in the living room watching television during the search.

The search of the Pinchot residence was executed by approximately nine agents by means of a "search and finder" system. Agents were assigned to search a specific area and raid leader McCluskey was to review items brought to him by the other

agents to determine whether they were subject to seizure. McCluskey testified that his review of the items presented during the hour and ten minute search was cursory and he admitted that many items were improperly seized. It appears that with one exception[1] every item presented to McCluskey was tagged and seized. Approximately eight boxes of records were seized at the Pinchot residence. Mrs. Jones was presented with a copy of the search warrant which included an inventory summary of the items taken. Agents McCluskey and Brown then proceeded to the Rowland Lane residence where an additional eight boxes of records were seized.

At approximately 4:30 p.m. on May 1, Mr. Jones telephoned respondent Bernice Yost, Group Manager of the Criminal

1/ The agent refused to seize wrapped wedding gifts.

Investigation Division, and demanded the return of all of the records and stated they were needed for the operation of the business. Ms. Yost replied that certain items would be returned and on May 4 an adding machine and a blank checkbook were returned to the Joneses.

On May 6 the Joneses' attorney presented to Ms. Yost a written request for the return of all records. Ms. Yost did not fully comply with this request, however, and on May 7 merely returned blank business forms, an address book, a file cabinet, and various fiscal year 1981 records. (Exhibits 11, 12). The IRS has retained possession of the bulk of the seized records (Exhibits 15a, 15b, 15c) and has microfilmed many of the documents.

Petitioners filed a petition and an amended petition on May 27, 1981 seeking the return and suppression of the seized

records, and requesting a temporary restraining order preventing respondents from proceeding with their investigation of petitioners stemming from evidence obtaining as a result of the searches and seizures on April 4, April 25 and May 1, 1981. The Court issued a temporary restraining order on June 10, 1981. Respondents filed a motion to dismiss which was denied by the Court on June 25 following oral argument. An evidentiary hearing was held on July 10 and July 14, 1981.

DISCUSSION

In ruling on the motion to dismiss the Court determined that it had jurisdiction under Rule 41(e)[2] of the Federal

2/ Rule 41(e) provides:

> Motion for Return of Property. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property

Rules of Criminal Procedure and on the basis of its inherent equity powers. See G. M. Leasing Corp. v. United States, 429 U.S. 338, 360, 97 S.Ct. 619, 50 L.Ed.2d 530 (1977). At the time of the evidentiary hearing the respondents conceded and the Court finds that petitioners have shown sufficient irreparable injury to support such jurisdiction in this matter. See id: Hunsucker v. Phinney, 497 F.2d 29, 34 (5th Cir. 1974), cert. denied, 420 U.S. 927, 95 S.Ct. 1124, 43 L.Ed.2d 397 (1975).

Footnote 2 (cont'd)

> was seized for the return of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial. If a motion for return of property is made or comes on for hearing in the district of trial after an indictment or information is filed, it shall be treated also as a motion to suppress under Rule 12.

Petitioners raise several arguments in support of their Rule 41(e) request for the return and suppression of the seized records. They contend that the April 4 and April 25 meetings with the agents constituted illegal warrantless searches. They then argue that the May 1 search and seizure at the Pinchot residence was invalid under the fruit of the poisonous tree doctrine. This latter argument is that the search warrant was tainted by the affidavit which contained facts learned as a result of the prior unconstitutional searches.

Petitioners also maintain that all of the Pinchot evidence should be suppressed and returned on the ground that the search warrant was executed in an unreasonable manner and because the agents failed to comply with IRS internal procedures. Alternatively, they contend that at the very minimum those Pinchot records

not described in the search warrant should be returned and suppressed. With respect to the Rowland Lane documents, petitioners suggest that the consent was involuntary and was tainted by the illegal Pinchot search and seizure. In the alternative they assert that the consent was revoked and thus they are entitled to the suppression and return of the original records and those copies made after the consent was revoked.

Respondents oppose each of these arguments and request that the Court vacate the temporary restraining order and dismiss the amended peition.

Business Opportunities Project

This case presents novel issues concerning the use of undercover activities by the IRS. It appears that this is the first suit challenging the propriety of the BOP. As noted above the BOP involves IRS agents posing as prospective

purchasers of business. By presenting themselves as interested buyers the agents attempt to obtain incriminating evidence by appealing to the seller's natural inclination to reveal skimming. A seller may be inclined to disclose to a buyer that he is skimming in order to present a more positive picture of the income of the business than is actually reflected on the records of the company.

Here the agents attempted to augment this tendency to reveal skimming by adopting a "good guy--bad guy" approach. Agent Manning was the "good guy" who would appear to be anxious to close the deal, while his "partner" agent Mason would be hesitant and insist on further documentation of the skim. This approach has the effect of encouraging the sellers to think that one of the partners is on their side and thus they will receive their asking price if only they can

convince the "bad guy" of the true amount of the skim. Under these circumstances the sellers are more likely to produce the best available documentation of the skim, documentation that also will be the most damaging evidence in a later prosecution for tax fraud.

The reasonableness of warrantless searches during undercover operations turns on the particular circumstances of each case. Lewis v. United States, 385 U.S. 206, 208, 87 S.Ct. 424, 17 L.Ed.2d 312 (1966). In this case the agents engaged in tactics which were specifically designed to induce petitioners to consent to a review of the skimming records. Moreover, when asked by the broker Bornstein whether he was with the IRS, Manning just laughed and said nothing. Yet not only is Manning an agent with the Criminal Investigation Division of the IRS, but it is clear that

the IRS approached this as a criminal investigation, at least from the moment during the initial February 7 meeting when Manning first understood that Mr. Jones was skimming.

The court in United States v. Tweel, 550 F.2d 297, 299 (5th Cir. 1977), set forth the standard which is applicable to the April 4 and April 25 consent searches: "It is a well established rule that a consent search is unreasonable under the Fourth Amendment if the consent was induced by the deceit, trickery or misrepresentation of the Internal Revenue agent." This Court believes that the conclusion in Tweel is equally appropriate in this case: "From the facts we find that the agent's failure to apprise the appellant of the obvious criminal nature of the investigation was a sneaky deliberate deception by the agent under

the above standard and a flagrant disregard for appellant's rights. The silent misrepresentation was both intentionally misleading and material." Id. Indeed, the facts of this case present an even more egregious intrusion on the rights of petitioners since they did not know Manning and Mason were associated with the IRS, whereas the appellant in Tweel was at least aware that he was dealing with agents he thought were engaging in a routine civil audit. Even agent Mason himself during his deposition evidenced concern for the propriety of the BOP: "There has always been a question in my mind as to how far you can go before you would give a person his Miranda warning. I have always had a problem with conducting a criminal investigation under the guise of something else. I feel that is a violation of a person's rights."

(Deposition of James Mason, p. 48, lines 10-15).

Respondents advance two primary theories to justify the BOP against the Fourth Amendment challenge in this case. First, they contend that the April 4 and April 25 meetings were not searches since the agents were mere "receivers of information." It is clear that the activities of Manning on April 4 and the actions of Manning and Mason on April 25 were searches within the meaning of the Fourth Amendment. As the Court observed in Haerr v. United States, 240 F.2d 533, 535 (5th Cir. 1957): "A search implies an examination of one's premises or person with a view to the discovery of contraband or evidence of guilt to be used in prosecution of a criminal action. The term implies exploratory investigation or quest." See United States v. Raub, 637 F.2d 1205, 1207-08 (9th Cir. 1980).

Respondents next assert that if the meetings were searches, then they were "reasonable" searches similar to those upheld in cases involving undercover activities. This Court concludes that the attempted analogy to cases involving ongoing criminal activity falls far short of the mark. Simply stated, respondents have not cited any case which convinces the Court that the IRS is identical, or even substantially similar, to the FBI for purposes of analyzing the effect of undercover operations on Fourth Amendment rights. Most of the cited cases involve the possession or transfer of contraband, where there is a manifest public interest in preventing continuing crime and seizing items which pose a risk to the health and safety of society. See, e.g., United States v. White, 401 U.S. 745, 91 S.Ct. 1122, 28 L.Ed.2d 453 (1971); United States v. Guidry, 534 F.2d 1220

(6th Cir. 1976). In that context, the suspect has no legitimate business or property interest in retaining possession or engaging in the transaction.

None of respondents' cases are analogous to the present circumstances in which the undercover operations are designed to secure evidence of a prior tax violation. Although the Court recognizes the importance of enforcing the tax laws, it cannot be said that noncompliance by a given taxpayer presents a threat to the general health and welfare of the public. In addition, it has been noted that society does have an interest in the propriety of police tactics regardless of the gravity of the offense being investigated. United States v. Penn, 647 F.2d 876, 886 (9th Cir. 1980) (Goodwin, J., dissenting). Furthermore, a taxpayer, whether complying or noncomplying,

has a legitimate interest in marketing his business.

While the Court of course recognizes the "necessity of undercover work" and "the value it often is to effective law enforcement," Weatherford v. Bursey, 429 U.S. 545, 557, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977), it also appears to the Court that the unique nature and function of the IRS bears upon the question of the necessity for or value of undercover activities by IRS agents. Specifically, the value and necessity of the BOP is minimized to the extent that the continued operation of the project would interfere with the IRS' reliance on voluntary assessment and compliance by taxpayers. As the court noted in Tweel: "Our revenue system is based upon the good faith of the taxpayers and the taxpayers should be able to expect the same from the government in

its enforcement and collection activities." Tweel, supra, 550 F.2d at 300.

The Court concludes that the orchestrated ruse employed by the respondents on April 4 and April 25 constitutes a search in violation of petitioners' Fourth Amendment rights. Under the fruit of the poisonous tree doctrine, information obtained as a result of an illegal search cannot be used to support a search warrant. Alderman v. United States, 394 U.S. 165, 177, 89 S.Ct. 961, 22 L.Ed.2d 176, (1969); see Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). It is the respondents' burden to show that the search warrant is not tainted by the previous illegal searches. See Dunaway v. New York, 442 U.S. 200, 218, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979); Nardone v. United States, 308 U.S. 338, 341, 60 S.Ct. 266, 84 L.Ed. 307 (1939). Respondents have

not met this burden. Accordingly, the Court concludes that the search warrant as well as the Pinchot search and seizure of May 1 are the direct products of the prior illegal searches on April 4 and April 25 and thus all the property seized pursuant to this warrant must be suppressed and returned to petitioners.

Pinchot Residence

Aside from the issue of the tainted search warrant, petitioners argue that all of the Pinchot records should be suppressed and returned on the grounds that the search and seizure was conducted in an unreasonable manner and went well beyond the scope of the warrant. In the alternative, petitioners assert that those items not described in the warrant were illegally seized and thus are subject to return and suppression. Respondents, on the other hand, insist that none of the Pinchot items were illegally

seized, or, alternatively, that only the undescribed items ought to be suppressed and returned.

Petitioners maintain that the manner of the search and seizure was unreasonable since the "agents literally emptied the Joneses' home of all paper records even though the search warrant listed only five specific items." (Post Trial Memorandum of Points and Authorities, p.3, July 14, 1981). While the Court certainly connot condone this type of overreaching by the IRS, it appears that suppression and return of all the evidence is not the proper remedy for such conduct. In addressing this contention, the Court notes the analysis in VonderAhe v. Howland, 508 F.2d 364 (9th Cir. 1974), where the majority of the court refused to suppress all of the seized evidence under a remarkably similar set of facts. Both here and in

VonderAhe the most unreasonable aspect of the conduct of the IRS agents is the fact that they proceeded "to asport practically every piece of paper they could lay their hands on." Id at 365.

The Court is also unable to accept the position at the other extreme taken by the respondents -- that none of the Pinchot records should be suppressed or returned because of the method in which the search and seizure was executed. The search warrant here is extremely specific in describing the five items to be siezed,[3] yet virtually every item conceivably related to petitioners' financial affairs, as well as some unrelated items, was loaded into the IRS van. (Exhibits 12, 15). Respondents acknowledge

3/ The warrant provided for the seizure of the following items:

1. Packages of sales invoices folded in half for the period December 23, 1975 to the present.

that it is their burden to justify the seizure of the undescribed items by demonstrating a nexus between those items and the crime being investigated. Warden v. Hayden, 387 U.S. 294, 307, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967); see Andresen v. Maryland, 427 U.S. 463, 483-84, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976). Respondents have failed to meet this

(Footnote 3 cont'd)

2. Manila envelopes containing corporate cash receipts/case disbursements and general ledger sheets for the fiscal years ending November 30, 1976, 1977, 1978, 1979 and 1980.

3. Cash receipts/case disbursements book (dark, bound, 8 1/2" x 14"), a general journal (dark, bound, 9" x 12"), both for the fiscal year 1981.

4. Black and white cardboard container (12"x10"x4") containing current duplicated bank deposit information, with customer identifying information, and current (1981) folded sales invoices.

5. A 5" x 6" sheet of paper containing summary listing skimmed receipts of Acme Meat Company, Inc. for the years 1975 through December 1980, inclusive, located in a two-drawer filing cabinet.

burden, however, as there simply has been no adequate showing that any of the items beyond those enumerated in the warrant are relevant to a skimming case. Indeed, the fact that respondents did not find it necessary to retain as potential evidence the vast quantity of items voluntarily returned to petitioners on May 4 and May 7 suggests to the Court that respondents in effect have conceded that there is no nexus between those materials and a skimming charge.

If the Court had not already concluded that all of the Pinchot records should be returned and suppressed because of the illegal searches and the tainted warrant, the Court would be constrained to find that the intermediate position adopted by both parties -- that only the undescribed items seized from the Pinchot residence should be returned and suppressed as a result of the manner in

which the search and seizure was conducted -- is supported under the law and the facts of this case. Authority for this approach in this circuit is also found in United States v. Daniels, 549 F.2d 665, 668 (9th Cir. 1977), where the court noted: "The exclusionary rule does not require the suppression of otherwise legal seizures merely because they were part of the same search in which an illegal seizure occurred." See also, United States v. Hubbard, 493 F.Supp. 209, 222 (D.D.C. 1979) and cases cited therein. As discussed above, the seizure of the Pinchot records is not "otherwise legal" since the seizure was based upon a tainted warrant.

Rowland Land Residence

During the course of the Pinchot search and seizure on May 1, 1981, the agents obtained the consent of Mrs. Jones to allow the agents to search the

Joneses' new home on Rowland Lane, to which they were in the process of moving. Later that afternoon two agents went to the Rowland Lane residence and seized approximately eight boxes of records. Testimony at the hearing revealed that Mr. Jones telephoned respondent Yost around 4:30 p.m. on the day of the search and demanded the return of all seized records. A written demand for the return of the records was presented to Ms. Yost by the Joneses' attorney on May 6.

Petitioners raise several arguments in seeking the suppression and return of the Rowland Lane documents. First, they assert that the consent to the search was not voluntary since Mrs. Jones in effect was in custody by the agents when she consented to the search. While the facts do not suggest that Mrs. Jones was in custody, consent to a search may be voluntary, even though it is given by a

person in police custody. United States v. Perez, 644 F.2d 1299, 1302 (9th Cir. 1981). In any event, under the present circumstances respondents have met their burden of proving that the consent was given voluntarily. Bumper v. North Carolina, 391 U.S. 543, 548, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968).

Petitioners direct the Court's attention to United States v. Taheri, 648 F.2d 598 (9th Cir. 1981), where the court stated: "Even assuming that the consent was voluntary, however, the evidence found as a result of that consent must nonetheless be suppressed if the unconstitutional conduct was not sufficiently attenuated from the subsequent seizure to void exclusion of the evidence." Id. at 601 (citation omitted). Respondents bear the burden of proving admissibility by showing that Mrs. Jones' consent was "sufficiently an act of free will to

purge the primary taint of the unlawful invasion." United States v. Perez-Esparza, 609 F.2d 1284, 1289 (9th Cir. 1979), quoting Wong Sun v. United States, 371 U.S. 471, 486, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); see Taheri, supra, 648 F.2d at 601. The Court concludes that respondents have not shown sufficient attenuation of the taint of the unlawful conduct in this case.

Mrs. Jones' consent was obtained on May 1 during the course of an illegal search of the Pinchot residence. Under these circumstances it is clear that there is a "close causal connection" between the unlawful conduct and the consent, Dunaway v. New York, supra, 442 U.S. at 218, and it is beyond question that the illegal activity tended to significantly direct the investigation toward obtaining the consent to seize the evidence in question. United States v.

Patino, 649 F.2d 724, 729 (9th Cir. 1981); United States v. Chamberlin, 644 F.2d 1262, 1926 (9th Cir. 1980). Thus the consent was tainted. Moreover, respondents cannot point to the lapse of time or an intervening event that would serve to dissipate the taint. See Taheri, supra, 648 F.2d at 601. This is not a case in which the decision to consent was "completely self-motivated" or was unforseeable by the agents, where excluding the evidence from the ensuing search would serve no deterrent purpose. Perez-Exparza, supra, 609 F.2d at 1289; see Brown v. Illinois, 422 U.S. 590, 610, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975) (Powell, J. concurring in part). It appears to the Court that respondents should not be permitted to exploit the illegality of their presence in the Joneses' home by exercising the opportunity to secure the consent of Mrs.

Jones for the Rowland Lane search. See Wong Sun v. United States, supra, 371 U.S. at 488. Therefore, consistent with the deterrence and judicial integrity purposes of the exclusionary rule, the Court will order the suppression and return of all the items taken from the Rowland Lane residence. See Dunaway v. New York, supra, 442 U.S. at 218; United States v. Perez-Esparza, supra, 609 F.2d at 1288-91

Petitioners also argue that they are entitled to the return and suppression of the Rowland Lane items on the separate ground that the consent to the search was revoked by the demands for their return. The Ninth Circuit has held that where a taxpayer consents to a taking of business records but later demands their return, the IRS must return the records and all copies made subsequent to the withdrawal of consent. United States v. Ward, 576

F.2d 243 (9th Cir. 1978); see Mason v. Pulliam, 557 F.2d 426 (5th Cir. 1977). This holding is directly applicable to the instant case. Accordingly, on this basis petitioners would be entitled to the suppression and return of all the original items taken from the Rowland Lane residence and those copies made subsequent to the withdrawal of consent at approximately 4:30 p.m. on May 1, 1981.

In their final post-trial brief petitioners raised an additional argument that the evidence should be suppressed because the agents failed to comply with guidelines for the BOP suggested by the National Director in his approval of January 23, 1981. See United States v. Caceres, 440 U.S. 741, 99 S.Ct. 1465, 59 L.Ed.2d 733 (1979); United States v. Sourapas, 515 F.2d 295 (9th Cir. 1975). In light of the Court's disposition in

this case, the Court will decline to pass upon this issue.

CONCLUSION

The Court concludes that the BOP has operated to violate petitioners' Fourth Amendment rights in that illegal warrantless searches were conducted on April 4, and April 25, 1981. Thus, the May 1 Pinchot search and seizure is rendered invalid since it was based upon a warrant tainted by these prior illegal searches. Consequently, petitioners are entitled to the suppression and return of all the Pinchot items on that basis. If the Court had not so concluded, petitioners would be entitled to the return and suppression of those Pinchot records not within the scope of the warrant on the separate ground that the search and seizure was executed in an unreasonable manner.

The Court will order the return and suppression of all the Rowland Lane items since the consent to that search was tainted by the unlawful conduct of respondents. Even were that not so the revocation of the consent would independently require the suppression and return of the original Rowland Lane records as well as all copies made after the consent was withdrawn.

THEREFORE, IT IS ORDERED vacating the temporary restraining order of June 10, 1981 and now granting the petition to the following extent:

1. Respondents are ordered to return to petitioners all books, records, correspondence, documents and other items, and all copies thereof, as well as all extracts, including all evidence obtained directly therefrom, in possession of federal authorities, that were obtained contrary to law and as a result

of the unlawful searches and seizures in this case; and

2. Respondents are permanently restrained and enjoined from using in any criminal proceeding against petitioners any written documents or evidence, copies thereof, all notes, all memoranda, and other reproductions and summaries thereof, relating to tax matters of corporate petitioner for the fiscal years ending November 30, 1976 through November 30, 1980, inclusive, and individual petitioners for the calendar years ending December 31, 1976 through December 31, 1980, inclusive, obtained by respondents from petitioners.

DATED this 19th day of October, 1981.

/s/
Valdemar A. Cordova
U.S. District Court Judge

APPENDIX B

OPINION OF THE NINTH CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM E. JONES and GLADYS A. JONES, husband and wife, and ACME MEAT COMPANY, INC., an Arizona corporation, Petitioners, v. PRESCOTT A. BERRY, District Director, Internal Revenue Service; DAVID C. ARNELL, Chief, Criminal Investigation Division, Internal Revenue Service; BERNICE YOST, Group Manager, Criminal Investigation Division, Internal Revenue Service; JOHN M. MANNING, Special Agent, Criminal Investigation Division, Internal Revenue Service; JAMES E. MASON, Special Agent, Criminal Investigation Division, Internal Revenue Service; JOHN DOE I-X, inclusive; and JANE DOE I-X, inclusive, Respondents.	FILED October 24, 1983 Philip B. Winberry, Clerk, U.S. Court of Appeals No. 81-5922 D.C. No. CIV 81-581-PHX-V OPINION

Appeal from the United States District Court for the District of Arizona
Valdemar A. Cordova, District Judge, Presiding

APPENDIX B

Argued and Submitted:
October 13, 1982

BEFORE: SKOPIL and FLETCHER, Circuit Judges, and McNICHOLS,* District Judge.

FLETCHER, Circuit Judge:

The Internal Revenue Service (IRS) appeals from the district court's grant of appellee's pre-trial motion to suppress evidence. The IRS challenges the holding that appellees' fourth amendment rights were violated by IRS undercover agents who elicited incriminating information from them by false pretences. Our court's jurisdiction rests on 28 U.S.C. § 1291 (1976). We reverse and remand.

I

FACTS

In May of 1977, IRS Special Agent John Manning requested approval for an undercover operation designed to discover tax fraud by owners of businesses offered

* The Honorable Ray McNichols, United States District Judge for the District of Idaho, sitting by designation.

for sale. Manning proposed examining the tax returns of businesses that were for sale to determine the potential for skimming income[1] from the business. Where skimming appeared possible, special agents, posing as prospective purchasers of the business, would meet the business sellers, gain their confidence, and then attempt to obtain evidence of skimming for use in subsequent tax prosecutions. The project, known as the Business Opportunity Program (BOP), was approved by the Arizona District IRS Director in June of 1977 and by the National Director in January of 1981.[2]

Special Agent Manning initiated the BOP by checking newspaper advertisements of businesses for sale. On January 10, 1981, he visited the offices of a business broker, telling the broker that he and his partner were looking for businesses to purchase in the Phoenix area.

Though skimming was not openly discussed, Manning suggested subtly that he was particularly interested in businesses with a cash flow susceptible to skimming. The broker mentioned that he knew a company that might suit Manning's purpose. Whether skimming was actually occurring at the company was never discussed but the characteristics of the business that would make it susceptible to skimming were discussed.

On February 7, 1981, the broker identified to Manning the business he had in mind as Acme Meat Co. After Manning executed an agreement providing for confidentiality of all information he received about the company, the broker permitted him to examine Acme's corporate income tax returns for 1976, 1977 and 1978. After reviewing the tax returns, Manning and the broker visited the premises of Acme where they met William

Jones, the owner, and toured the business. Manning's discussion with Jones regarding skimming did not go beyond hints and suggestions, but Manning gained the impression that Jones was skimming. At the close of the February 7 meeting, Manning indicated he was interested in the business and would like to see the books and records.

At a second meeting arranged for April 4, Manning and the broker met Jones at his personal residence. Manning examined the cash receipts and disbursements ledger, invoices, certain other business records, and the general corporate ledger. Manning was not supplied any records that would constitute "documentable proof" of unreported income under the BOP guidelines. But Manning persisted seeking another meeting which took place on April 25, 1981.

Manning, accompanied by Special Agent Mason, met Jones at the Acme Meat Company factory. Mason blatantly suggested that he and Manning were interested in purchasing a business that could generate substantial skimming. They demanded to see records supporting Acme's purported skim. Jones led the agents to his home where Mrs. Jones produced records which substantiated the skim. The agents left, promising to contact the Joneses promptly about their decision.

On May 1, 1981, armed with a search warrant, several IRS agents went to the Jones home. Two of the agents approached Mrs. Jones in the front yard of her home. Noting the home was for sale, they announced that they were realtors interested in viewing the premises. Once inside, they informed Mrs. Jones that they were Internal Revenue Service special agents with a search warrant. A

thorough search of the house ensued. A second residence owned by the Joneses was also searched pursuant to Mrs. Jones' consent. During the search, IRS agents seized 16 boxes of papers, records and books. In addition to business records, the agents seized a file cabinet, an adding machine, rubber bands, pencils, stamps, paperclips and other office supplies, a popcorn popper warranty and a book on body building. Three thousand items were taken from the Jones' two residences.[3]

At least two requests were made for the return of all or part of the items seized. Finally, on May 27, 1981, the Joneses and Acme Meat Co. filed a motion under Rule 41(e) of the Federal Rules of Criminal Procedure seeking the return and suppression of the seized records. Following an evidentiary hearing, the district court granted the relief requested.

The district court found that although the undercover operation might have been valid if performed by a different law enforcement agency seeking evidence of a different kind of crime, it was an unreasonable search when done by the IRS and violated appellees' fourth amendment rights Jones v. Berry, 524 F.Supp. 645, (D. Ariz. 1981). Finding that the information for the search warrant had been obtained as a result of impermissible undercover activities, the court suppressed the evidence obtained by the IRS. Id. As to the items seized at the second house, the trial court held that, even absent a finding of a fourth amendment violation as to the search for and seizure of those items, the IRS should return all items seized at the second residence because the Joneses had effectively withdrawn their consent to

the search by requesting the return of the documents. Id. at 654.

II

DISCUSSION

A. The "Search" of Appellees' Home by the IRS.

The analytic framework for determining whether law enforcement activities constitute a search within the meaning of the fourth amendment is found in Katz v. United States, 389 U.S. 347 (1967), particularly in Justice Harlan's concurring opinion. In Katz, government agents eavesdropped on conversations in a telephone booth by means of an electronic iistening device attached to the top of the booth. Holding that "the Fourth Amendment protects people, not places," id. at 351, the Court discarded the trespass analysis applied in prior cases to determine whether a fourth amendment search occurred. Id. at 351-53. The court concluded that, despite the absence

of a physical intrusion into the telephone booth, the agents' actions "violated the privacy upon which [the defendant] justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment." Id. at 353. As stated more explicitly by Justice Harlan, the court in Katz recognized two requirements for the existence of a privacy interest protected by the fourth amendment: "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" Id. at 361. (Harlan, J., concurring). Where both prongs of the test are met, law enforcement activity that intrudes upon the privacy interest is considered a search within the meaning of the fourth amendment. We turn to an application of

the Katz test to the facts of the case before us.[4]

The district court, after its review of the facts "conclude[d] that the orchestrated ruse employed by the [IRS agents] on April 4 and April 25 constitute[d] a search in violation of petitioners' Fourth Amendment rights." 524 F. Supp. at 652. In its view, undercover activities, while often necessary to effective law enforcement, should not be sanctioned when employed by the IRS because such operations "would interfere with the IRS' reliance on voluntary assessment and compliance by taxpayers." Id. Indeed, the court found that "the IRS is [not] identical, or even substantially similar, to the FBI for purposes of analyzing the effect of undercover operations on Fourth Amendment rights." While we agree with the district court that the BOP, even if implemented in

conformity with the National Director's requirements, may ultimately be destructive, we reluctantly disagree that such policy concerns can control our decision here. The district court's failure to apply the Katz test leaves essentially unsupported its conclusion that a fourth amendment search occurred in this case.[5]

When the Katz standard is applied to the facts presented by this case, we conclude that the IRS activities with respect to the Joneses and Acme Meats, however unwise and shortsighted they may have been, did not constitute a search within the meaning of the fourth amendment. The first part of the Katz test asks whether the Joneses exhibited by their conduct an intention to preserve as private the evidence of skimming obtained by the IRS agents. See Smith v. Maryland, 442 U.S. 735, 740 (1979). Pertinent to answering this question are the

decisions of the Supreme Court in Hoffa v. United States, 385 U.S. 293 (1966), and Lewis v. United States, 385 U.S. 206 (1966). In Hoffa, the Court stated that the fourth amendment affords no protection to "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." Id. at 302. In subsequent cases, courts have applied the "misplaced confidence" doctrine of Hoffa to undercover activities by agents of the Internal Revenue Service, see United States v. Scott, 521 F.2d 1188, 1191 (9th Cir. 1975); see also United States v. Irvine, 699 F.2d 43, 45-46 (1st Cir. 1983) (noting possible applicability of Hoffa), to investigations of past criminal activities, see United States v. Davanzo, 699 F.2d 1097, 1100 (11th Cir. 1983)(citing United States v. Lovasco, 431 U.S. 783 (1977)), and to confidences revealed to agents as

well as informers, see United States v. Schuster, 684 F.2d 744, 747-748 (11th Cir. 1982), rehearing granted, 697 F.2d 910 (1983); United States v. Scott, 521 F.2d at 1191. The chief remaining limitation on the "misplaced confidence" doctrine appears to be that the agent or informer may not search for evidence not voluntarily revealed by the unsuspecting criminal. Compare Lewis v. United States, 385 U.S. at 209-210, with Gouled v. United States, 255 U.S. 298, 205-206 (1921). See United States v. Schuster, 684 F.2d at 748-749 (scope of search must be limited to consent given). This limitation, however, is not applicable to appellees' case.[6] Accordingly, we believe that Hoffa and its progeny compel the conclusion that when, as here, undercover agents gain the confidence of one suspected of criminal activity, and the suspect later voluntarily reveals to the

agents evidence of crimes, he or she can have no expectation of privacy in the information so revealed. See United States v. White, 401 U.S. 745, 749 (1971)(plurality opinion). Government discovery of information or activities, as to which a defendant exhibits no expectation of privacy, is not a search within the meaning of the fourth amendment. See, e.g., Katz v. United States, 389 U.S. at 361 (Harlan, J., concurring); United States v. Kramer, No. 82-2024, slip op. at 5-7 (7th Cir. July 5, 1983)(discussing policy search of trash containers).[7]

Our conclusion that there has been no fourth amendment violation in this case should not be misconstrued as approval of the tactics employed by the IRS agents. It is plain from the record that the IRS has violated its own policy on undercover operations. The agents involved admit

that neither of the National Director's express conditions for implementation of the BOP were met until long after the Jones investigation began.[8]

Democratic governments are based on a relationship of trust between government and the governed. If the possibility exists that the next acquaintance one makes may be a government agent conducting a hidden investigation unjustified by any indication of wrongdoing, every relationship will be tainted by suspicion and fear.

B. The "Consent Search" of Appellees' Second Residence.

When the IRS searched the Jones residence on May 1, it discovered that some of the documents named in the search warrant had been moved to a second house owned by the Joneses. The IRS agents sought and received permission from Gladys Jones to search the second residence for the items listed in the

warrant. On the same day, after the search of the second residence had been completed, William Jones telephoned the IRS stating that he was withdrawing the consent to search the second residence and wanted the IRS to return all documents seized there. The IRS refused.

In their motion pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, the Joneses requested the district court to suppress all evidence seized by the IRS at their second residence on alternate grounds. First, they argued that the search of the second residence was tainted by its close connection to the allegedly illegal search of the first residence, and second, they argued that the seizure of evidence from the second residence was conducted in the absence of effective consent. The district court agreed with both contentions

and ordered the suppression and return of any evidence discovered there.

Because the district court erred in its conclusion that the search of the first residence was illegal, suppression of evidence found at the second residence is not warranted on the ground that the search of the second residence was tained by the search of the ffrst. We must, therefore, determine whether the district court correctly concluded that the evidence seized at the second residence should be suppressed on the independent ground that the search of the second residence was conducted in the absence of effective consent. The district court relied on United States v. Ward, 576 F.2d 243 (9th Cir. 1978).

Ward held that a person may revoke a consent to search at any time prior to the completion of the search. The court remanded for an evidentiary hearing to

segregate the evidence gathered before from that gathered after the revocation of consent and did not foreclose the government from securing the material as to which the search has not been completed by other lawful means.

In this case, Mrs. Jones consented to a search of her second residence for certain records named in a search warrant. This search was carried out and the items named were discovered and seized before Williams Jones revoked the consent granted by his wife. Had the revocation of consent occurred before the IRS agents completed their search of the second residence for the documents named in the warrant, Ward would compel the conclusion that any further search of the residence for the documents subsequent to the revocation of consent would be illegal, but that is not the situation with which we are faced. The house was searched and

the documents seized before the consent was revoked.[9] Accordingly, the district court erred in ordering suppression of the evidence seized at the Joneses second residence on the basis of our decision in United States v. Ward.

III

CONCLUSION

Because the district court erred in finding that the IRS activities in this case violated the fourth amendment, and because it erred in concluding that the IRS had searched one of the Jones residences in the absence of effective consent, its judgment granting the appellees' motion to suppress and return evidence under Fed. R. Crim. P. 41(e) must be reversed and the case remanded for further proceedings.

REVERSED AND REMANDED.

FOOTNOTES

1/ "Skimming" income is the removal of a portion of gross income without entering it in financial records of a business' bookkeeping system. The skimmed income thus never shows up in the bookkeeping system and is not reported as income for tax purposes.

2/ The BOP was initially disapproved by the National Director. Eventually efforts to secure national approval met with success. Upon approval, the National Director warned the agents that "indiscriminate usage, absent sufficient basis, could potentially adversely reflect upon the service." Two express conditions were imposed:

> At the very least, before an agent contacts a business seller, we should have a reasonable basis to believe that the taxpayer offering the business for sale has understated the reported net profit of the business. Also, the [tax] returns of the business do not reflect a realistic picture of income when compared with the asking (selling) price. [sic]

3/ The district court correctly ruled that all items seized in excess of those named in the search warrant should be returned to the Joneses. See VonderAhe v. Howland, 508 F.2d 364, 368, 372 (9th Cir. 1974).

4/ We review the district court's conclusion that a violation of the fourth amendment occurred in this case under the de novo standard applicable to questions of law. See United States v. Bates, 533 F.2d 466, 468 (9th Cir. 1976).

5/ The district court relied principally on the Fifth Circuit's decision in United States v. Tweel, 550 F.2d 297, 299, (5th Cir. 1977), to conclude that a violation of the fourth amendment occurred in this case. Tweel, however, is distinguishable. There, IRS agents, known to the suspect to be IRS agents empowered to conduct civil audits, abused the voluntary civil tax reporting and investigation system by inducing the suspect to turn over records for a criminal investigation. Thus, they abused the powers of their positions. Here, by contrast, the IRS agents did not pretend to be civil agents, thereby implicitly invoking their powers as civil investigators, when in fact they intended to conduct a criminal investigation. Rather, the agents pretended to be fellow criminals in order to gain the Joneses' con fidence. Such deception is far different from that practiced in Tweel. The other cases relied upon by the Fifth Circuit in support of the rule of Tweel are subject to the same distinction, see United States v. Rothstein, 530 F2d 1275, 1278 (5th Cir. 1976); United States v. Dawson, 486 F.2d 1326, 1329 (5th Cir. 1983); United States v. Bland, 458 F.2d 1, 8 (5th Cir.), cert. denied, 409 U.S.

843 (1972); United States v. Tonahill, 430 F.2d 1042, 1044 (5th Cir.), cert. denied, 400 U.S. 943 (1970); United States v. Prudden, 424 F.2d 1021, 1033, (5th Cir.); cert. denied, 400 U.S. 831 (1970), as are the cases from this circuit, see United States v. Robson, 477 F.2d 13, 17 (9th Cir. 1973); Simon v. United States, 421 F.2d 667, 668 (9th Cir.), cert. denied, 398 U.S. 904 (1970); Spahr v. United States, 409 F.2d 1303, 1306 (9th Cir.), cert. denied, 396 U.S. 840 (1969).

6/ There is, for example, no argument that the agents in this case heard or saw anything that the Joneses did not intend them to hear or see. Lewis v. United States, 385 U.S. 206, 209-10 (1966).

7/ There is no allegation that the IRS undercover operations were in excess of statutory authority or conducted in violation of specific statutory or regulatory authority. While we agree with the policy considerations discussed in the district court opinion, we are unable, on the facts of this case, to agree that the district court's suppression order should be sustained by the exercise of our supervisory powers. See United States v. Caceres, 440 U.S. 741, 755-57 (1979); United States v. Irvine, 699 F.2d 43, 45-46 (1st Cir. 1983).

8/ The violations of policy by the IRS agents subject them to sanctions from within the agency. We assume the sanctions will be applied to prevent further abuses.

9/ No claim can be made that items seized in the course of a consent search, if found, must be returned when consent is revoked. Such a rule would lead to the implausible result that incriminating evidence seized in the course of a consent search could be retrieved by a revocation of consent.

APPENDIX C

ORDER OF THE NINTH CIRCUIT

DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM E. JONES and GLADYS A. JONES, husband and wife, and ACME MEAT COMPANY, INC., an Arizona corporation,	)
Petitioners,	)
v.	)
PRESCOTT A. BERRY, District Director, Internal Revenue Service; DAVID C. ARNELL, Chief, Criminal Investigation Division, Internal Revenue Service; BERNICE YOST, Group Manager, Criminal Investigation Division, Internal Revenue Service; JOHN M. MANNING, Special Agent, Criminal Investigation Division, Internal Revenue Service; JAMES E. MASON, Special Agent, Criminal Investigation Division, Internal Revenue Service; JOHN DOE I-X, inclusive; and JANE DOE I-X, inclusive,	) FILED December 20, 1983 Philip B. Winberry, Clerk, U.S. Court of Appeals) No. 81-5922) D.C. No. CIV 81-581-PHX-) ORDER
Respondents.	)

Before: SKOPIL and FLETCHER, Circuit Judges, and McNichols, District Judge.

APPENDIX C

The panel as constituted above has voted to deny the petition for rehearing; Judges Skopil and Fletcher have voted to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Office - Supreme Court, U.S.
FILED
APR 25 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1216

In the Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM E. JONES, ET UX., ET AL.,
PETITIONERS

v.

PRESCOTT A. BERRY, DISTRICT DIRECTOR,
INTERNAL REVENUE SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether an undercover operation by IRS criminal investigators was an unconstitutional "search."

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1216

WILLIAM E. JONES, ET UX., ET AL.,
PETITIONERS

v.

PRESCOTT A. BERRY, DISTRICT DIRECTOR,
INTERNAL REVENUE SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B24) is reported at 722 F.2d 443. The opinion of the district court (Pet. App. A1-A40) is reported at 524 F. Supp. 645.

JURISDICTION

The judgment of the court of appeals (Pet. App. B1) was entered on October 24, 1983. A petition for rehearing (Pet. App. C1) was denied on December 20, 1983. The petition for a writ of certiorari was filed on January 23, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In January 1981, the Criminal Investigation Division of the Phoenix IRS office initiated the "Business Opportunity Project" (Pet. App. A2-A3). Its objective was to bring to light, by the use of IRS special agents acting undercover, violations of the tax laws by businesses in the Phoenix area. The agents were to pose as prospective purchasers or investors with a particular interest in businesses from which income might be "skimmed" and thus concealed from the IRS. The theory behind the program was that owners of businesses who had skimmed income would disclose that fact to prospective buyers, hoping to convince them that the company was more profitable than its books and tax returns suggested. Pet. App. A2-A3, A17-A18.

On January 10, 1981, IRS Special Agent Manning contacted a business broker and said that he wished to buy a company in the Phoenix area (Pet. App. A3). Manning indicated that he was especially interested in a business with a substantial cash flow susceptible to skimming (*id.* at A3-A4). The broker replied that he might have such a business (*id.* at A4).

At a subsequent meeting, the broker advised Manning that petitioner Acme Meat Company might suit his purposes (Pet. App. A4). After signing an agreement not to divulge information about Acme to anyone but professional advisors, Manning was allowed to examine Acme's corporate tax returns for 1976-1978 (*id.* at A4-A5). The broker then introduced Manning to petitioner William Jones, a shareholder and principal officer of Acme, at the business premises (*id.* at A5-A6). Manning was given a tour of the operation (*ibid.*).

On April 25, 1981, Manning again met Jones at Acme (Pet. App. A6). Manning was accompanied by IRS Special Agent Mason, who posed as his investment partner (*ibid.*).

Jones told the agents that he had been skimming income from Acme for some years (*id.* at A6-A7). Mason requested proof of the skim (*id.* at A7-A8). The three then went to Jones's residence, where petitioner Gladys Jones produced a five-by-six-inch piece of paper that purported to summarize the amounts skimmed from Acme during the preceding years (*ibid.*). In response to Mason's request for evidence supporting those figures, Mrs. Jones produced five large bundles of folded invoices, and proceeded to reconcile the invoices with the figures on the five-by-six-inch summary sheet (*id.* at A8).

On May 1, 1981, a federal magistrate, on the basis of Manning's affidavit setting forth the facts described above, issued a search warrant authorizing a search of the Joneses' residence and the seizure of specified documents (Pet. App. A9). The house was searched that same day (*ibid.*). After unsuccessfully demanding from the IRS return of all the books, records, and other items taken in the search, petitioners filed this action under Fed. R. Crim. P. 41(e) for return of property allegedly seized illegally.[1] Petitioners contended that the undercover activities of Agents Manning and Mason were "searches" prohibited by the Fourth Amendment, and that, under the "fruit of the poisonous tree" doctrine, the information obtained thereby could not provide a proper foundation for the warrant subsequently issued by the magistrate. Pet. App. A12-A13, A15-A16.

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[1] Rule 41(e) provides that "[a] person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property * * * which was illegally seized." The Rule provides that if a motion for return of property "is made or comes on for hearing * * * after an indictment or information is filed, it shall be treated also as a motion to suppress under [Fed. R. Crim. P.] 12." No indictment or information has been filed against petitioners in this case, in large part because the district court enjoined any use of the seized evidence against them.

The district court agreed with petitioners, holding that "the orchestrated ruse employed by the [IRS undercover agents] constitute[d] a search in violation of petitioners' Fourth Amendment rights" (Pet. App. A25). While recognizing that this Court has repeatedly sustained undercover operations against Fourth Amendment challenge (*id.* at A22-A23), the district court believed that the reasoning of those cases does not apply to undercover operations conducted by the IRS. In the district judge's view, the IRS is not "identical, or even substantially similar, to the FBI for purposes of analyzing the effect of undercover operations on Fourth Amendment rights" (Pet. App. A22). Whereas other undercover operations often involve contraband, as to which "there is a manifest public interest in preventing continuing crime and seizing items which pose a risk to [public] health and safety," noncompliance by a given taxpayer with the tax laws does not in the court's view "present[] a threat to the general health and welfare" (Pet. App. A22-A23). The court also questioned "the necessity for or value of undercover activities by IRS agents" (*id.* at A24), suggesting that "a taxpayer, whether complying or noncomplying, has a legitimate interest in marketing his business," and speculating that undercover operations might "interfere with the IRS' reliance on voluntary assessment and compliance by taxpayers" (*id.* at A23-A24). Having concluded that the warrant was based on information gleaned from an illegal search, the district court ordered the seized property returned to petitioners and permanently enjoined the government from using it as evidence "in any criminal proceeding against [them]" (*id.* at A39-A40).

The court of appeals unanimously reversed (Pet. App. B1-B24). It held that this Court's decisions in *Hoffa* v. *United States*, 385 U.S. 293 (1966), and subsequent cases "compel the conclusion that when, as here, undercover agents gain the confidence of one suspected of criminal

activity, and the suspect later voluntarily reveals to the agents evidence of crimes, he or she can have no expectation of privacy in the information so revealed" (Pet. App. B14-B15). The court thus held that the special agents' undercover operation was not a "search" (*id.* at B15, citing *Katz* v. *United States*, 389 U.S. 347 (1967)), and that the subsequent seizure of petitioners' documents pursuant to the warrant was valid.[2]

ARGUMENT

The decision below is correct. Contrary to petitioners' contention, there is no conflict among the circuits on the question presented. There is no basis for review by this Court.

1. The court of appeals correctly held that the IRS undercover operation was not a "search." The application of the Fourth Amendment depends on whether a person has "a legitimate expectation of privacy." *Smith* v. *Maryland*, 442 U.S. 735, 740, 744 (1979); *Katz* v. *United States*, 389 U.S. 347 (1967). "This Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Smith*, 442 U.S. at 743-744. The Fourth Amendment "does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and [that] the confidence placed in the third party will not be betrayed." *United States* v. *Miller*, 425 U.S. 435, 443 (1976). And the Fourth

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[2]The court of appeals also upheld the search of another building pursuant to petitioners' consent, concluding that their purported revocation of consent came too late to invalidate that search (Pet. App. B16-B20). Petitioners do not challenge that holding.

Amendment does not protect a person's "misplaced confidence" that a government informer "to whom he voluntarily confides his wrongdoing will not reveal it." *Hoffa* v. *United States*, 385 U.S. 293, 302 (1966).[3]

These decisions dictate the correctness of the court of appeals' result here. When asked by the special agents whether they were skimming from Acme, and whether they had business records documenting the skim, petitioners were not forced to respond affirmatively or, indeed, to respond at all. Rather, they voluntarily chose to reveal their wrongdoing in order to enhance their chances of selling their business (and thus to obtain further benefit from their wrongdoing). Even if petitioners entertained a subjective expectation of privacy concerning their disclosures — a dubious assumption — their expectation was not "reasonable" because they "assumed the risk" that the men with whom they spoke were themselves government agents, or were persons who might reveal their wrongdoing to government agents. *Smith*, 442 U.S. at 743-745.[4]

Petitioners' effort to avoid the impact of *Hoffa* and its progeny (Pet. 33-37) is unavailing. In petitioners' view, those cases stand merely for the proposition that "[s]ociety

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[3]Petitioners err in suggesting (Pet. 23-27) that the vitality of *Hoffa* was undercut by *Katz*. This Court has repeatedly reaffirmed *Hoffa* and its "misplaced confidence" rationale. *E.g.*, *Smith*, 442 U.S. at 744; *Miller*, 425 U.S. at 440, 443.

[4]Petitioners contend (Pet. 27-29) that the court of appeals erroneously considered *Hoffa* and its progeny as bearing upon the first prong of the *Katz* test (whether petitioners "exhibited an actual * * * expectation of privacy"), rather than upon the second prong (whether their alleged expectation of privacy was "one that society is prepared to recognize as reasonable"). Pet. 25-29 (original quotation marks omitted), quoting *Katz*, 389 U.S. at 361 (Harlan, J., concurring). Whether or not this contention is correct, the court of appeals properly held "that *Hoffa* and its progeny compel the conclusion" that the IRS undercover operation was not a "search" (Pet. App. B14), and any defect in the analytical process by which the court reached that conclusion would not be a basis for granting certiorari.

does not recognize as reasonable a criminal's expectation that he can engage in illegal transactions without the threat of governmental intrusion" (Pet. 33). Petitioners then seek to distinguish those cases from this one on the ground that, "[w]hile society has no interest in protecting illegal transactions, it has a substantial interest in protecting commerce and allowing disclosures necessary to convey legal businesses," such as the disclosures petitioners made in an attempt to sell Acme (*id.* at 35).

This argument is frivolous. Society scarcely has an interest in protecting the kind of disclosures petitioners made here, for those disclosures consisted of touting and documenting an illegal skimming operation in an effort to reap further benefit from the illegal conduct by encouraging a prospective successor to engage in similar activities. In any event, what makes an expectation of privacy "unreasonable" in the case of a communication to an informant is not that the communication itself literally is part of an illegal transaction. It is, rather, that the speaker "assumes the risk" that his interlocutor will disclose what is said, so that any subjective expectation of privacy the speaker may entertain is "unreasonable" in a normative sense. See, *e.g.*, *Smith*, 442 U.S. at 743-745.[5]

2. Contrary to petitioners' contention (Pet. 12-20), the decision below does not conflict with *United States* v. *Tweel*, 550 F.2d 297 (5th Cir. 1977). In *Tweel*, IRS civil investigators sought to examine a taxpayer's records in the custody of his accountant. In an effort to gain access to the

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[5]There is no merit to petitioners' suggestion (Pet. 31-32) that the Constitution requires government agents to have some basis for believing that unlawful conduct will occur before instituting an undercover investigation. See, *e.g.*, *United States* v. *Myers*, 692 F.2d 823 (2d Cir. 1982), cert. denied, No. 82-1255 (May 31, 1983); *United States* v. *Jannotti*, 673 F.2d 578, 608-609 (3d Cir.), cert. denied, 457 U.S. 1106 (1982).

records, the agents led the accountant to believe that no criminal investigation was pending, whereas they were in fact conducting their audit at the request of the Organized Crime and Racketeering Section of the Justice Department (550 F.2d at 298). The Fifth Circuit in those circumstances held that the accountant's consent to search of the records was procured by deceit, and hence that the search violated the Fourth Amendment (*id.* at 298-299).

The court below correctly distinguished *Tweel* (Pet. App. B22 n.5). It noted that, whereas the IRS examiners there had "abused the powers of their positions" by practicing deceit, the undercover agents here did not pretend to be civil examiners, hoping to secure petitioners' trust by virtue of their office, but rather "pretended to be fellow criminals" (*ibid.*). The Fifth Circuit itself has distinguished *Tweel* on precisely this ground. See *SEC* v. *EMS Government Securities, Inc.*, 645 F.2d 310 (1981). The Fifth Circuit there held that "[t]he key to [*Tweel* was] the nature of the relationship between the government agent and the private citizen," explaining that *Tweel* was based on a belief that "a private person has the right to expect that the government, when acting in its own name, will behave honorably," that an individual should be able to rely on the representations of a government agent who "seeks that individual's cooperation based on his status as a government agent," and that "it [is] clearly improper for a government agent to gain access to [otherwise unavailable] records * * * by invoking the private individual's trust in his government, only to betray that trust" (645 F.2d at 316). Since the undercover agents here obviously did not gain access to petitioners' records by virtue of their "status as * * * government agent[s]" or "by invoking [petitioners'] trust in [the] government," *Tweel* is distinguishable under the Fifth Circuit's own understanding of that case. Because there is thus no reason to believe

that the Fifth Circuit would have decided the present case differently from the decision below, there is no conflict in the circuits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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